

STATE OF MICHIGAN  
COURT OF APPEALS

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CHARLENE BETH LEZELL,

Plaintiff-Appellant,

v

HILLER, INC, and OAKLAND MALL, LLC,

Defendants-Appellees.

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UNPUBLISHED

January 24, 2006

Nos. 256415;257384

Oakland Circuit Court

LC No. 2003-047347-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

In Docket No. 256415, plaintiff appeals as of right, challenging the trial court's orders granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). In Docket No. 257384, plaintiff appeals as of right from the trial court's order awarding case evaluation sanctions of \$1,440 to defendant Hiller, Inc., and \$1,638 to defendant Orchard Mall, L.L.C. We affirm.

I. Docket No. 256415

Plaintiff was injured while shopping at defendant Hiller's Market when a shopping cart rolled down a nearby ramp and struck her. Hiller's Market is located in a strip mall and it leases its space from the owner of the strip mall, defendant Orchard Mall. Plaintiff brought this action alleging that defendants failed to maintain the premises in a safe manner. The trial court granted defendants' motions for summary disposition on the basis that the allegedly dangerous condition, i.e., the ramp, was open and obvious. The court additionally found that Hiller's Market did not have the requisite possession or control of the ramp to impose liability, regardless of the applicability of the open and obvious doctrine.

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition.

This Court reviews de novo a trial court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether

the moving party was entitled to judgment as a matter of law.” *Michigan Ed Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm’r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

A premises possessor must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Ghaffari v Turner Construction Co*, 473 Mich 16, 19; 699 NW2d 687 (2005). This duty, however, does not generally encompass removal of open and obvious dangers. *Id.* at 21. “Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Id.* at 21-22 (citation omitted). The open and obvious doctrine should not be viewed as some sort of exception to the duty generally owed invitees, but rather viewed as an integral part of the definition of that duty. *Lugo v Ameritech, Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

In assessing whether an alleged dangerous condition is open and obvious, the focus is on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). Because the test is objective, courts look not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his position would foresee the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). In other words, a court must focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the particular plaintiff. *Lugo, supra* at 524-525; *Bragan v Symanzik*, 263 Mich App 324, 331-332; 687 NW2d 881 (2004).

The premises possessor is not required to protect an invitee from an open and obvious danger unless “special aspects” of the condition make it unreasonably dangerous. *Lugo, supra* at 517. A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519. For example, special aspect conditions would include (1) an unguarded thirty-foot-deep pit in the middle of a parking lot resulting in a fall of an extended distance, and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available. *Id.* at 518, 520.

As an initial matter, we reject plaintiff’s argument that the open and obvious doctrine is not applicable to this action because she is asserting only a claim for general negligence, not premises liability. The crux of plaintiff’s complaint is that the condition of the property was unreasonably dangerous and that defendants, as possessors of the property, failed to maintain a safe premises and failed to exercise reasonable care for her safety. Plaintiff does not allege any acts of active negligence by either defendant. We agree with the trial court that the open and obvious doctrine is fully applicable to this case. *Ghaffari, supra* at 21; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-496; 595 NW2d 152 (1999).

The evidence established that the ramp and its elevated condition were clearly visible. There is no genuine issue of material fact that an ordinary patron, upon casual inspection, should have been able to observe the elevated condition of the ramp and discover that carts could possibly roll down. Further, there are no apparent special aspects to the ramp indicating that any danger from rolling carts was unavoidable or presented an unreasonable high risk of severe

harm. Thus, the trial court properly held that the open and obvious doctrine bars plaintiff's claims against defendants.<sup>1</sup>

## II. Docket No. 257384

Plaintiff challenges the trial court's award of case evaluation sanctions to defendants. Plaintiff does not argue that case evaluation sanctions were not authorized in this case, but contends that the trial court should have declined to award defendants case evaluation sanctions under the "interest of justice" exception of MCR 2.403(O)(11).

MCR 2.403(O) provides, in pertinent part:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

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(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

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(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, *in the interest of justice*, refuse to award actual costs. [Emphasis added.]

Because the "verdict" in this case was entered as a result of the trial court's rulings on defendants' motions for summary disposition after rejection of the case evaluation, under subsection (O)(11), the trial court had discretion to refuse to award actual costs in the interest of justice.

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<sup>1</sup> We agree that the trial court erred to the extent that it determined that Hiller's Market was also entitled to summary disposition for the reason that it did not have possession or control of the ramp area. Evidence that the ramp area was included in an amendment to the lease between Hiller's Market and Orchard Mall, and evidence that Hiller's Market was storing its carts on the ramp and routinely retrieved shopping carts and cleaned up spills from the ramp, viewed in a light most favorable to plaintiff, established a genuine issue of material fact whether Hiller's Market exercised dominion and control over the ramp at the time of plaintiff's injury. See *Derbabian v Mariner Pointe Associates*, 249 Mich App 695, 703-704; 644 NW2d 779 (2002). Nonetheless, we conclude that summary disposition was properly granted to Hiller's Market based on the open and obvious doctrine.

As this Court explained in *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005), the “interest of justice” exception should be invoked only in “unusual circumstances,” such as where a legal issue of first impression or public interest is present, the law is unsettled and substantial damages are at issue, there is a significant financial disparity between the parties, or where the effect on third persons may be significant. These factors are not exclusive, and other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception. *Id.* See also *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444; 702 NW2d 637 (2005).

In this case, plaintiff argues that the trial court erred by not invoking the “interest of justice” exception under MCR 2.403(O)(11), because she reasonably rejected the case evaluation award, inasmuch as it would not have covered her projected medical expenses. We do not view plaintiff’s dissatisfaction with the amount of the case evaluation award as an unusual circumstance compelling application of the interest of justice exception. Further, plaintiff failed to offer any supporting documentation to the trial court in support of her claim that the case evaluation award would not cover her medical expenses. We also disagree with plaintiff’s argument that application of the exception was justified here because the law was unclear. While there may not have been prior cases involving the same unique facts presented here, we perceive no unclarity in the law relative to premises liability or the open and obvious doctrine to justify application of the interest of justice exception. Although income disparity is a factor that could justify application of the exception, plaintiff did not offer any documentation to the trial court establishing that there was in fact an income disparity. In any event, this circumstance, by itself, would justify application of the exception. For these reasons, the trial court did not abuse its discretion by refusing to apply the interest of justice exception in MCR 2.403(O)(11).

Lastly, there is no merit to plaintiff’s argument that sanctions against defendants are warranted under MCR 7.216(C)(1)(b) because defendants filed a motion to compel an appeal bond and opposed plaintiff’s motion to stay the proceedings. An appeal bond is authorized by MCR 7.204(E) and MCR 7.209(B)(1) and defendants were merely protecting their interests. There is no basis for this Court to conclude that defendants’ actions were “grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.” MCR 7.216(C)(1)(b). Nor did Hiller’s Market engage in vexatious conduct by filing a response to plaintiff’s second motion for a stay where the trial court never entered a prior order for stay.

Affirmed.

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

/s/ Alton T. Davis